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In the Supreme Court of the United States

OCTOBER TERM, 1987

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, ET AL.

CORPORATION FOR PUBLIC BROADCASTING, ET AL., PETITIONERS

v.

CENTURY COMMUNICATIONS CORP., ET AL.

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

CENTURY COMMUNICATIONS CORPORATION, ET AL.

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC., PETITIONER

v.

CENTURY COMMUNICATIONS CORPORATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

CHARLES FRIED
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Washington, D.C. 20530

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In this case, the court of appeals held unconstitutional the interim "must carry" rules of the Federal Communications Commission (Commission or FCC). Under those rules, cable television systems are required to retransmit certain broadcast signals for a limited period while the public learns that it can receive broadcast signals that are not carried by a cable operator. Although the Commission presented substantial arguments in support of the validity of the rules in the court of appeals, we cannot say that that court's judgment striking down these particular interim rules is of sufficient practical importance or legal significance to warrant this Court's review.

1. In the mid-1960s, the FCC adopted broad "must carry" rules applicable to all cable operators in the country (Pet. App. 36a-37a). Those rules required cable operators to carry the signals of local broadcast television stations. The Commission believed that the rules were needed to protect local broadcasters from the competition of cable companies (*id.* at 39a). In *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986), the court of appeals held that the FCC's broad must-carry rules were invalid under the First Amendment. The court stated that "in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat" (768 F.2d at 1459).

In light of the *Quincy* decision, the Commission commenced a rulemaking proceeding to consider whether to adopt new must-carry rules. In its *Report and Order* (Pet. App. 32a-204a), the Commission announced that its primary policy is to "maximize[ ] diversity and choice in television service" (*id.* at 94a). With this policy in mind, the Commission reasoned that "it is no longer appropriate

or desirable to treat cable as an auxiliary video distribution service and to protect local broadcast television services from competition with cable service" (*id.* at 97a). Rather, the Commission believed that consumer choice would be maximized if cable companies are free to select their own programs and cable subscribers are free to receive off-the-air signals by means of an antenna (*id.* at 102a). Accordingly, the Commission concluded that "must carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals" (*id.* at 111a).

Nevertheless, the Commission believed that some short-term regulation was needed to correct a consumer "misperception"—*i.e.*, that "their only means of access to off-the-air signals is through their cable service" (Pet. App. 99a). To remedy this problem, the Commission adopted a rule requiring "cable companies to provide their subscribers with input selector switches"—so-called "A/B switches"—"that will enable reception of broadcast signals by means of an antenna" (*id.* at 110a).[1] In addition, "out of an abundance of caution and concern" (*ibid.*), the Commission adopted interim must-carry rules. The Commission concluded that these limited must-carry rules are needed while cable subscribers learn that they can receive any off-the-air signal by means of installing an A/B switch and an antenna. Under these rules, which expire five years after promulgation (*ibid.*), cable systems with 21 channels or more must devote a portion of their channels (generally 25%) to local broadcast signals (*id.* at 120a).[2] Cable

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[1] The Commission also adopted a rule requiring cable operators to "inform subscribers of the changes in the regulations concerning the carriage of broadcast signals and of the need for input selector switches" (Pet. App. 113a).

[2] Cable systems with 20 or fewer channels need carry only one educational station (Pet. App. 119a-120a).

systems need not carry two stations affiliated with the same network nor stations that attract only a small number of viewers (*id.* at 117a, 121a).

The Commission rejected constitutional and statutory challenges to its interim must-carry rules. Analyzing the rules under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), the Commission stated that the "rules * * * satisfy the requirements of the First Amendment" (Pet. App. 154a, 158a). The Commission further concluded that the interim must-carry rules are consistent with the Cable Communications Policy Act of 1984 (47 U.S.C. (Supp. III) 521 *et seq.*), and "are not a 'taking' against private property for public use without compensation" (Pet. App. 158a).

2. On review, the court of appeals held that the Commission's interim must-carry rules violate cable operators' rights under the First Amendment (Pet. App. 28a).[3] The Court scrutinized the rules under its reading of the constitutional test announced by this Court in *O'Brien*—whether the rule advances a "substantial governmental interest" with an incidental restriction on speech that "is no greater than is essential to the furtherance of that interest" (391 U.S. at 377).

For several reasons, the court of appeals concluded that the record did not support a finding that the Commission's interim must-carry rules advance a substantial governmental interest. First, the court stated that there is "scant evidence" for the FCC's judgment that there is a widespread misperception that the only means of receiving off-the-air signals is through a cable system (Pet. App. 19a). Second, the court noted that the record did not support the Commission's "assumption" that cable companies would not carry local broadcasts without must-carry rules

[3] The court of appeals did not address the statutory and Fifth Amendment challenges to the interim must-carry rules.

(*id.* at 25a-26a). Lastly, the court of appeals held that the record did not justify a conclusion that the must-carry rules are narrowly tailored (*id.* at 26a-28a). The court observed that the "FCC adduces literally no evidence that this [interim] period must last for fully five years" (*id.* at 26a).[4]

3. This case does not warrant further review. The court of appeals applied the constitutional test (*O'Brien*) advanced by the Commission. In applying that test, the court of appeals may have imposed an excessively stringent evidentiary burden on the Commission to justify its interim must-carry rules. Compare *United States* v. *Albertini*, 472 U.S. 675 (1985); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984). In the context of this case, however, this limited legal dispute—concerning deficiencies found by the court of appeals in this particular administrative record—does not warrant this Court's attention.[5]

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[4] The court of appeals did not invalidate the Commission's rules concerning A/B switches and subscriber education. Pet. App. 31a.

[5] Moreover, there is no relevant conflict in the circuits. As a practical matter, the court of appeals' decision in this case has nationwide effect by setting aside the Commission's interim must-carry rules for the remainder of their intended five-year duration. And it is not clear that any other circuit would have reached a different decision in this case. Petitioners cite *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65 (1968), for the proposition that the Eighth Circuit believes that the First Amendment imposes virtually no constraints on the Commission's regulation of the content of cable signals. But in *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025 (1978), aff'd, 440 U.S. 689 (1979), the Eighth Circuit cast doubt on its *Black Hills* decision. The court stated that "we have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access" (571 F.2d at 1056).

The Commission adopted the must-carry rules for the sole purpose of ensuring access to local broadcasts while cable consumers are informed that they may receive off-the-air signals by installing an A/B switch and an antenna.[6] The Commission, however, has very little data indicating that consumers need years to gain this knowledge. Moreover, there are certainly many cable subscribers who also have television sets that are not connected to the cable system; those subscribers can receive broadcast signals simply by viewing their unconnected sets without installing an A/B switch. In addition, there is force behind the court of appeals' suggestion (Pet. App. 27a) that cable subscribers will have greater incentive to buy and install an A/B switch when there are no must-carry rules and if cable companies actually stop carrying local broadcast stations.[7]

There is also little basis, at this time, for concluding that local broadcasters will suffer from the lack of must-carry rules. As the Commission noted in its *Report and Order*,

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[6] There is no basis for the suggestion of petitioner Office of Communication of the United Church of Christ (87-1487 Pet. 11-17) that the Communications Act of 1934 (47 U.S.C. (& Supp. III) 151 *et seq.*) requires the Commission to readopt broad must-carry rules to protect local broadcasters from competition. The Communications Act (which, of course, was enacted prior to the development of either television or cablecasting) delegates to the Commission the task to "make available * * * to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" (47 U.S.C. 151). In fulfilling that mandate, the Commission has determined that broad must-carry rules are no longer desirable. The Commission's judgment in this matter is entitled to "substantial judicial deference." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

[7] Indeed, while must-carry rules are in effect, the main incentive to buy an A/B switch may be to have access to broadcast signals in the event that cable service is disrupted.

"existing empirical data concerning the actual effects of deletion of the must carry rules on signal carriage is sparse" (Pet. App. 149a n.159). The one fact that "is clear from the record" is "that cable systems do have incentives to carry broadcast stations" (*id.* at 102a). Indeed, the record indicates that, during the 16 months between the court of appeals' *Quincy* decision and the Commission's imposition of the interim must-carry rules, cable operators generally did not stop carrying local broadcast signals (*id.* at 25a).

The court of appeals' decision gives the Commission an opportunity to observe how broadcasters and the cable industry will operate without must-carry rules. And the Commission is taking advantage of that opportunity. The Commission recently began an inquiry concerning the effects of the absence of must-carry rules. See *Notice of Inquiry*, MM Dkt. No. 88-138 (Mar. 24, 1988). The Commission is seeking data about whether cable operators have stopped carrying broadcast signals and whether cable operators are charging broadcasters fees to carry their signals. The court of appeals did "not suggest that must-carry rules are *per se* unconstitutional" (Pet. App. 28a). Thus, if experience (as opposed to a prediction) proves that must-carry rules are needed to advance valid public interests, the Commission may build a record supporting new must-carry rules and defend those rules in the courts. In these circumstances, the question of the validity of the Commission's interim must-carry rules, which were "adopted out of an abundance of caution" (Pet. App. 110a), does not warrant this Court's review.

Respectfully submitted.

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